No. 10362

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARIO JOSEPH PACMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Jurisdictional Facts.

On January 13, 1943, the appellant was indicted for knowingly, wilfully, unlawfully and feloniously failing to report for induction into the Armed Forces of the United States of America on September 14, 1942, at Los Angeles, California, within the Southern District of California, Central Division. The indictment was brought under United States Code, Appendix, Title 50, Section 311. [Tr. of Record, pp. 2 and 3.] On January 21, 1943, the appellant plead not guilty [Tr. p. 5], the case set for trial January 27, 1943, and on January 29, 1943, the jury returned a verdict of guilty. On February 1, 1943, the appellant was sentenced to two years in a penitentiary. On February 5, 1943, a Notice of Appeal was filed by

appellant's then attorney. [Tr. pp. 8 and 9.] The time for settling and filing the Bill of Exceptions was extended a number of times, the last extension being to July 31, 1943. [Tr. pp. 14 to 24, incl.] The Bill of Exceptions was filed on July 31, 1943. [Tr. pp. 28 to 133, incl.] The Transcript of Record was filed August 16, 1943.

A Concise Abstract or Statement of the Case.

Appellant is a citizen of the United States, single, born July 13, 1907, and was employed as claims deputy for the State of California; that he registered under the Selective Training and Service Act of 1940 on October 16, 1940, at Los Angeles, California; that on the 20th day of December, 1940, there was mailed to him a Selective Service Questionaire, which was signed by the registrant and filed with the Board on December 26, 1940. The appellant claimed an exception to combatant military service and was first classified on January 6, 1941, and was placed in 1-D as a student; that on July 8, 1941, he was reclassified 1-H because of over-age; that on January 30, 1942, he filed a Conscientious Objector's form, No. 47 D. S. S.; that on March 13, 1942 appellant was reclassified 1-A; that on March 26, 1942, appellant was classified 1-A-O. In his letter dated March 27, 1942, addressed to the Selective Service Board [Defendant's Exhibit E, pp. 67-71] appellant sets forth at length the reasons for his position. On April 13, 1942, appellant wrote to his Local Board asking for reclassification. [Government's Exhibit 6, pp. 35-36.] Said letter was interpreted by the Local Board as a request for reclassification to IV-E, claiming exemption not only from combatant military service, but also from non-combatant military service.

The Board rejected appellant's request by letter dated April 15, 1942. [Government's Exhibit 7, pp. 37-38.] Under date of April 18, 1942, appellant requested an appeal. [Government's Exhibit 8, p. 38; Government's Exhibit 8-A, pp. 40-50.]

On August 20, 1942, the Appeal Board sustained the Local Board's decision, placing appellant in 1-A-O. Appellant's appeal was denied by the Appeal Board by reason of its reliance upon the FBI report, which report was the result of an investigation by the FBI without a hearing or opportunity afforded the appellant to disprove or overcome the effects of said investigation. On August 31, 1942, appellant was mailed D. S. S. Form 58, notifying him of the Appeal Board's action.

On September 2, 1942, the appellant sent a letter to his Selective Service Board stating that he was appealing for a presidential review and asked for a stay of induction. [Defendant's Exhibit C, pp. 61-62.] On September 3, 1942, there was mailed appellant Form D. S. S. 150 to report at 5:45 a. m. on the 14th day of September, 1942, for induction. [Government's Exhibit 9, pp. 50-52.] Appellant did not accept the call. On September 14, 1942, a Notice of Suspected Delinquency was mailed to appellant. [Government's Exhibit 10, pp. 53-54.]

On September 4, 1942, appellant appealed to Major Leitch, California State Director of Selective Service, requesting presidential review and stay of induction [Defendant's Exhibit J, p. 78] and received a reply thereto stating that the matter would be given consideration. [Defendant's Exhibit A, p. 79.]

That appellant offered in evidence a letter to said Major Leitch dated September 4, 1942, with five pages of his

reply to the FBI report. [Defendant's Exhibit K—see original.] On September 4, 1942, appellant sent a telegram to the National Director of Selective Service requesting a presidential review and stay of induction pending review. About September 4, 1942, appellant sent a telegram to the National Service Board for Religious Objectors to the same effect as said Exhibit "M," and in reply thereto, received a telegram stating that the induction order should not have been issued until ten days after classification. Appellant relied upon the information contained in said reply and because of said reliance, failed to appear for induction. Said last two telegrams were Defendant's Exhibits "N" and "O" for Identification. On September 19, 1942, appellant was informed by Major Leitch that his request for intervention was denied and appellant testified that he would have complied with the Order of Induction were it not for the fact that he believed said order was being reviewed and that when he received a communication from his Local Board dated September 3, 1942, that a stay of induction could only be ordered by the State or National Director of Selective Service [Government's Exhibit 12, p. 86], he thought that he could still have recourse to said State and National Directors, and that he did not know that if he failed to report for induction, he would be violating the law, but that if he had not attempted to appeal, he would have reported for induction at the time and place so ordered.

Specification of Assigned Errors to be Relied Upon.

Numbers 1, 3, 7, 9, 11, 12, 18, 25, 28, 29, 31 of Assignment of Errors.

Argument of the Case.

It will be noted that many assignments of errors are not to be relied upon. The reason for this is the decision of the Supreme Court in the case of *Falbo v. The United States,* 320 U. S. 549. Whatever our individual points of view may be as to the respective merits of the majority and dissenting opinions of the Court, we must, nevertheless, recognize the binding force and effect of the majority opinion. It is noteworthy that the dissenting opinion was written by Justice Murphy who is the only member of the present Court to wear a uniform in this war.

Our position is that the *Falbo* case is decisive of some, but not all of the points raised in this appeal. In so far as that decision applies, we yield to its final authority, although admittedly cherishing a preference for the dissenting argument of Justice Murphy. We proceed now to consider those assignments of error not covered by the *Falbo* case.

POINT ONE.

Assignment of Error No. 18 Is As Follows:

There is further error in the record of the District Court in the prejudicial remarks of the plaintiff's counsel, and particularly in the closing paragraphs set forth in the Bill of Exceptions, especially the last sentence [Tr. p. 110], as follows:

> "I ask you gentlemen to bring a verdict worthy of a man of this calibre who is willing to let your sons and brothers and friends go out and give their lives for a country which gives him the constitutional guarantee of a fair and full trial in which he can hide behind the defenses he has interposed on his own behalf."

With the country at war and some of the members of the jury probably having sons or brothers and certainly friends in the armed forces of our country and some of them probably on active fronts in distant lands, this language was intended and calculated to arouse the emotions, passions, prejudices, indignation and resentment of the members of the jury and undoubtedly did have this effect and was therefore prejudicial to the legal rights of the defendant since it resulted in his not having a fair trial and his being denied and deprived of due process of law.

* * *

In the case of *Viereck v. The United States,* 318 U. S. 236, 63 S. Ct. 561, 87 L. Ed. 734, the Supreme Court held a similar appeal could only have the purpose and effect

of arousing passion and prejudice. In that case the language in question was the following:

> "In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> "This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> "As a representative of your Government I am calling upon every one of you to do your duty." (See footnote, page 247.)

In commenting on the effect of said language, at page 248, the Court says:

> "At a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. *We think that the trial judge should have stopped counsel's discourse without waiting for an objection.* 'The United States Attorney is the representative not of an ordinary party to a controversy,

> but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' Berger v. United States, 295 U. S. 78, 88." (Italics supplied.)

The *Viereck* case may well be considered a leading case. In the short time that has elapsed since that decision it has been cited and followed on a number of occasions, among them the following:

In *Bagley v. The United States,* 136 Fed. (2d) 567, at page 570, the Court says:

> "'At a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war,' Viereck v. United States, 63 S. Ct. 561, 566, 87 L. Ed. ...., we must be particularly careful to hold to the foundations of our freedom."

In *The United States v. Coffman,* 50 Fed Supp. 823, at page 826, a decision by Judge Yankwich, the Court says:

> "The rules of fair play in criminal detection and prosecution should be observed with greater strict-

> ness 'at a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war.' Viereck v. United States, 1943, 318 U. S. 236, 248, 63 S. Ct. 561, 566, 87 L. Ed."

The California State Courts have likewise followed and quoted from the *Viereck* case: *People v. McDaniel,* 140 P. (2d) 88, at page 92, opinion by Justice Doran, and *People v. Lynch,* 140 P. (2d) 418, at page 424, where Justice White says:

> "What was said by the Chief Justice of the United States Supreme Court in the case of Viereck v. United States, 318 U. S. 236, 63 S. Ct. 561, 566, 87 L. Ed. ...., reflects our views as to the duties and obligations of a prosecuting officer."

The fact that no exception was taken to the said argument of plaintiff's counsel does not preclude this Court from considering the same. The Supreme Court itself says in the *Viereck* case, as quoted above: "We think that the trial judge should have stopped counsel's discourse without waiting for an objection." Again, in *United States v. Atkinson,* 297 U. S. 157, at page 160, the Court says:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceeding. See New York Central R. Co. v. Johnson, 279 U. S. 310, 318; Brasfield v. United States, 272 U. S. 448, 450."

In said case of *New York Central R. Co. v. Johnson, supra,* at page 318, the Court, through Justice Stone, says:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. *The public interest requires that the Court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."* (Italics supplied.)

Under the circumstances present in this case, with the conditions prevailing at the time of said trial, to wit, a little over a year after Pearl Harbor, and with the argument for the plaintiff being made by an attractive young lady, as Assistant United States District Attorney, the language in question constitutes such a strong appeal to the emotions of the jury as to require a reversal of the conviction in and of itself. As is said by the Court in *Ippolito v. The United States,* 108 F. (2d) 668, at page 671:

> "Sometimes a single misstep may be so destructive of a right of a defendant to a fair trial that reversal must follow. Pharr v. United States, 6 Cir. 48 F. (2d) 767."

There have been, of course, numerous cases of reversals by appellate courts on account of argument of counsel, particularly counsel for the Government. Each case, however, must be decided on its own facts, in accordance with certain established principles. It is hard to imagine a more direct and forceful appeal to the feelings, the passion and prejudice of the jurors than is contained in the language in question. It is fair to assume that at that time,

with the draft having been in effect since October, 1940, and the country at war for over a year, at least some of the jurors had "sons and brothers and friends" in the Armed Forces, who were either then risking or were shortly about to risk their lives and limbs for their country. This was not an issue in the case. This argument was not only improper, but also highly prejudicial. If permitted to go unrebuked by the decision of this Court, one of the most precious rights of our citizens would be in danger. As was said by the Court in *Beck v. The United States,* 33 F. (2d) 107, at page 114:

> "A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record for convictions."

What was said by the Supreme Court of the United States in *Ex parte Milligan,* 71 U. S. 2, 18 L. Ed. 281, has strong application to the present case. In that famous case, at page 118, the Court says:

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law."

"To be tried and punished according to law" means that the party accused of crime, any crime, is entitled to the protection afforded him by the established and ac-

cepted rules of criminal trial and procedure. To deprive him of any the least of the same is violative of said principle so clearly enunciated by our Supreme Court in the famous case of *Ex parte Milligan, supra.*

At another point in said *Milligan* case, at page 120, the Court says:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shields of its protection all classes of men, at all times, and under all circumstances."

In the concurring opinion in the *Milligan* case, page 132, Chief Justice Chase says:

> "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice."

It is submitted that the same principle applies no matter what the law is which is violated—certainly the proper conduct of a trial is as fundamental and important as any other right and a part of the law of the land. These clear and emphatic statements in the *Milligan* case are all the more applicable in a case like the present where the guilt of the accused is so far from being admitted that it is strenuously denied.

POINT II.

Number 12 of Assignments of Error Is as Follows:

Said District Court erred in making certain comments in the course of the trial which, while done without any intention of being unfair to the defendant (counsel have too high a regard for the judge who sat in this case to even dream of accusing him of intentional unfairness or bias in any case at any time), resulted in the failure of the defendant to have a fair trial, and which comments and conduct of the court were prejudicial to the rights of the defendant, in that they show the impatience of the court with defendant's case and must have had some influence on the jury and its verdict. Among said comments are the following:

(a) The defendant's counsel asked the defendant the following question [Tr. p. 83, lines 1-6]:

"Did you, prior to the time of being prosecuted, make any attempt to get into any branch of the United States Army, under military supervision, where there would be danger to you, but would be such you would not have to kill?"

An objection to said question was sustained with the following comment by the court, "I have listened enough to your arguments."

(b) Again when defendant's counsel inquired of the court [Tr. p. 83, lines 22 ff]:

"Will Your Honour permit me a short recess so that I may get my papers in order?", the court responded, "I am going to try to get through. I will have to ask you to proceed."

(c) Again [Tr. p. 95, lines 7-8] appears the following:

"The Court: 'I am going to finish this case tonight. I have spent two whole days on it.'"

(d) Again, when counsel for defendant moved to reopen the case to ask the defendant several questions, in granting the motion, the court said [Tr. p. 99, lines 36 ff]:

"The Court: 'It is a matter entirely in the discretion of the court. I am three days on a case that should have taken one. I will permit it.'"

(e) Said conduct of the court is in sharp contrast with the court's attitude towards the Government's counsel. The record shows [Tr. p. 100, lines 36 ff] as follows:

"Miss Kluckholn: 'Your Honour, the Government moves that the case be reopened and that I be permitted to question the defendant.'

"The Court: 'It is granted. Proceed.'"

* * *

We respectfully submit that said comments and conduct of the trial court constituted reversible error. We submit that the trial judge did not conform to those standards of fairness and impartiality which the Constitution and the law of the land accords to every citizen accused of the commission of a crime. As was stated by the court in the case of *Egan v. The United States*, 287 Fed. 958, at page 971:

> "The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused."

Intentional unfairness is not claimed here nor does it have to be shown. What was said by this Honorable Court in the case of *Williams v. United States,* 93 Fed. (2d) 685, at 687, is quite applicable here, as follows:

> "In reviewing this assignment, we are not unmindful that the able District Judge who tried this case has, heretofore, established a reputation for fairness and judicial poise, and in this opinion we do not wish to imply that the trial judge intentionally was unfair. But as the authorities herein referred to point out, the harm done is not diminished where the judge, by reason of unrestrained zeal, or through inadvertence, departs from 'that attitude of disinterestedness which is the foundation of a fair and impartial trial.' "

POINT III.

Assignment of Error No. 3 Is as Follows:

Said District Court erred in refusing to admit in evidence Defendant's Exhibit "C", in that the same has a direct and material bearing on the existence of criminal intent.

* * *

The general principle of law is as set forth in 22 *Corpus Juris Secundum,* page 84, "Crime is not committed if the mind of the person doing the act is innocent, '*Actus non facit reum, nisi mens sit rea.*' "

In order to eliminate intent as a necessary element in a statutory crime, it must clearly appear that such was the legislative intent. It is hardly necessary to take up the time of this Court to show that this does not clearly appear in the Act in question. In fact, it was assumed

throughout the trial, as will appear from a reading of the transcript, that criminal intent was a necessary element to be established beyond a reasonable doubt.

As to the evidence which is properly admissible to prove either the existence or absence of criminal intent, the general principle of law is set forth in *Norcott v. The United States,* 65 F. (2d) 913, at page 918, as follows:

> "It is always proper for one charged with crime to prove any fact which throws light upon his intention, where that element is involved. * * *"

Exhibit "C" for identification [Tr. pp. 61-62] shows that the appellant was not seeking to evade the provisions of the Act, but merely to avail himself of an appeal to an agency higher than the Local and Appeal Boards as provided in the Selective Service and Training Act. Therefore, it clearly has a bearing upon the intent of the appellant. It was sent prior to the induction date, in fact, it was dated about twelve days prior to the induction date, and it was error on the part of the court to refuse its admission in evidence.

POINT IV.

Assignment of Error No. 7 Is as Follows:

Said District Court erred in sustaining the objections to the offer of Defendant's Exhibit "K" in evidence, in that the same has a direct and material bearing on the existence of criminal intent.

* * *

Exhibit "K" for identification is the letter to State Director Leitch with five pages of appellant's reply to the FBI report. The letter was dated September 4, 1942, and is referred to both in Defendant's Exhibit "J" [Tr.

p. 78] and in Defendant's Exhibit "A" [Tr. p. 79]. Exhibit "K" [not in Tr.—see original Exhibit] is a request that Major Leitch review the classification, and sets forth the reasons why a Presidential Review should be granted. Said letter shows the lack of criminal intent on the part of the appellant and should have been admitted in evidence on the basis of the authorities cited in the argument under Point III.

POINT V.

Assignment of Error No. 9 Is as Follows:

Said District Court erred in sustaining the objections to the offer of Defendant's Exhibits "N" and "O" in evidence (offered together), in that the same has a direct and material bearing on the existence of criminal intent.

* * *

Exhibit "O" for identification is a copy of the telegram sent to National Service Board for Religious Objectors on September 4, 1942, and was a copy of Exhibit "M", the telegram sent to General Hershey, on the same date. Exhibit "N" is the answer to Exhibit "O" addressed to the appellant and reads as follows:

> "Advise induction order should not have issued until ten days after classification. National Service Board for Religious Objectors."

It is true the National Service Board for Religious Objectors was not an agency of the government, but it was organized to serve as a guide and source of authentic information for religious objectors throughout the country and had attained a position of recognition as such. It was consulted by religious objectors as to their rights and obligations and looked up to by them. Appellant

felt that he had a right to rely upon what they said to him. In any event, the fact that he received the telegram, Exhibit "N" for identification, prior to the induction date as appears from the evidence, and the contents of said telegram should have been permitted to go to the jury as having a direct and material bearing on appellant's criminal intent.

POINT VI.

Assignment of Error No. 11 Is as Follows:

Said District Court erred in granting plaintiff's motion to strike out defendant's answer when the defendant was asked what reason, if any, he had for not reporting on the 14th day of September, 1942, to-wit [Rep. Tr. p. 190, lines 3-11]:

> "I didn't report because I definitely felt that that particular induction order was being reviewed, or my classification was being reviewed and that I, the wire the court won't permit, and the other is the wire from Colonel Leitch. I wouldn't have refused to obey this induction order. It didn't tell me I would have to kill. I still had an alternative if these people would not give me justice or consideration, I could go there."

The answer was material and properly admissible on the issue of criminal intent.

* * *

It is submitted that criminal intent refers to what went on in the mind of the appellant, and that he alone knows the considerations influencing and directing his actions. He should therefore certainly be permitted to testify thereto and the Court erred in striking said answer.

POINT VII.

Assignment of Error No. 25 Is as Follows:

Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

> "You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed, and the registrant relies in good faith upon said representation, and in good faith believes that an order of a local draft board is stayed while said review is pending that any violation by said registrant, under the above circumstances, of any order of a local draft board is not committed knowingly.
>
> "You are further instructed that if a registrant in good faith, because of reliance upon information which he in good faith believes, that an order of a local draft board has been stayed, and that he is under no legal requirement to comply with such order, violates said order, he does not do so konwingly."

* * *

This instruction appears on page 115 of the transcript. The indictment, itself, charges that "the defendant did then and there knowingly, wilfully, unlawfully and feloniously fail to report for induction into the Armed Forces of the United States." [Tr. p. 3.] Said language of the indictment is in accordance with the provisions of requirements of the Selective Service and Training Act. There was evidence admitted in the record showing that the defendant in good faith believed that the order of the Local Draft Board was stayed, and that he believed the order was being reviewed. [Tr. p. 82.] Defendant's Exhibit "A", being the telegram from State Director of

Selective Service Leitch, was such as to lead a reasonable man to come to the conclusion which the appellant testified he, himself, had reached. Inasmuch as there was testimony upon which such an instruction could have been based and inasmuch as the instruction was on a material issue and in accordance with the requirements of the Selective Service and Training Act, the instruction should be given, and it was error for the trial court to refuse to give said instruction.

POINT VIII.

Assignment of Error No. 28 Is as Follows:

Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

> "You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed, and the registrant relies in good faith upon said representation and in good faith believes that an order of a local draft board is stayed while said review is pending that any violation by said registrant, under the above circumstances, of any order of a local draft board is not felonious.
>
> "You are further instructed that if a registrant in good faith because of reliance upon information which he in good faith believes, that an order of a local draft board has been stayed, and that he is under no legal requirement to comply with such order, and said registrant however violates said order, that said violation is not felonious."

* * *

Said instruction appears on pages 114-15 of the transcript. The argument set forth under Point VII is equally applicable to this instruction.

POINT IX.

Assignment of Error No. 29 Is as Follows:

Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

> "You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed, and the registrant relies in good faith upon said representation, and in good faith believes that an order of a local draft board is stayed while said review is pending, that any violation by said registrant, under the above circumstances, of any order of a local draft board is not wilful.
>
> "You are further instructed that if a registrant in good faith, because of reliance upon information which he in good faith believes, that an order of a local draft board has been stayed, and that he is under no legal requirement to comply with such order, and said registrant however violates said order, that said violation is not wilful."

* * *

The argument under Point VII above is equally applicable to the foregoing instruction.

POINT X.

Assignment of Error No. 31 Is as Follows:

Said District Court erred in refusing to give to the jury the following instruction, requested by the defendant:

> "You are instructed that the defendant is charged with having feloniously failed to report for induction into the armed forces of the United States. You must therefore find the defendant not guilty if you

find that he did not feloniously fail to report for induction; or if you find that there is a reasonable doubt as to whether the defendant feloniously failed to report you will find the defendant not guilty."

* * *

The argument under Point VII above is equally applicable to the foregoing instruction.

POINT XI.

Assignment of Error No. 1 Is as Follows:

Said District Court erred in entering judgment against, and in pronouncing sentence upon, the appellant, in that the evidence was insufficient to support the verdict of guilty for the reason that no criminal intent was proven.

* * *

The only direct testimony on the intent of the appellant was that given by himself and as pointed out above, all tended to prove that he had no criminal intent. The jury had to resort to surmises, guesses and inferences to find to the contrary. The fact that they did so find is proof that they were influenced by the appeal of the Assistant United States Attorney to passion and prejudice and by the comments and conduct of the Court, as well as the failure to give the requested instructions.

Conclusion.

We respectfully submit that for the reasons and errors hereinbefore set forth, the conviction of the appellant should be set aside and the judgment vacated.

David R. Rubin and
Leland S. Bower,
Attorneys for the Appellant.